Neutral Citation Number: [2020] EWHC 1774 (Ch)

Case No: FL-2020-000014

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)
Before:

MR JUSTICE BIRSS

IN THE MATTER OF an application for directions by **The Law Debenture Trust Corporation p.l.c.** as trustee of the trusts identified below

AND IN THE MATTER OF a trust deed dated 20 December 1985 as amended by a supplemental trust deed dated 6 February 1986 between Bell Group NV, The Bell Group Limited and The Law Debenture Trust Corporation p.l.c.
AND IN THE MATTER OF a trust deed dated 7 May 1987 between Bell Group NV, The Bell Group Limited and The Law Debenture Trust Corporation p.l.c.
AND IN THE MATTER OF a trust deed dated 14 July 1987 between Bell Group NV, The Bell Group Limited and The Law Debenture Trust Corporation p.l.c.
AND IN THE MATTER OF a trust deed dated 25 July 1988 between The Bell Group Limited, Drayton Capital Pty Ltd and The Law Debenture Trust Corporation p.l.c.
AND IN THE MATTER OF a trust deed dated 25 July 1988 between The Bell Group Limited, Bell Group Finance Pty Ltd, Drayton Capital Pty Ltd and The Law Debenture Trust Corporation p.l.c.

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 09/07/2020

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Richard Salter QC, **Andrew Clutterbuck QC** and **James Knott** (instructed by **Eversheds Sutherland**) for the **Applicant, the Trustee**

Hearing dates: 30th June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BIRSS

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30pm on 9th July 2020.

Mr Justice Birss :

1. This is a Part 8 claim by The Law Debenture Trust Corporation p.l.c. ("the Trustee") for approval of its intended course of action as trustee of five bond issues. The primary issue before the court is whether a declaration should be made that the Trustee is acting properly and is justified in not taking steps to prevent or interfere with a settlement reached in December 2019 of various very long running disputes arising from insolvencies of companies in the Bell Group in Western Australia and Curaçao ("the 2019 Settlement"). The 2019 Settlement, if it completes, will lead to the distribution of assets worth about AUD 2 billion. It will also lead to the eventual winding up of the bond trusts. It is a condition precedent of the 2019 Settlement that the Trustee, although not a party to the 2019 Settlement, should obtain the Negative Declaration from this court by 20 July 2020.

Legal Principles

2. This claim is within the second of the four categories of trustee application, described by Robert Walker J (as he was then) in an unreported decision in 1995 (referred to in ***Public Trustee v Cooper*** [2001] WTLR 901) as follows:

> "The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers."

3. For guidance on the approach that the court takes to these kinds of "momentous" cases, where there is no surrender of discretion by the trustee, the Trustee referred to 39-095 and 39-096 of *Lewin on Trusts* 20th edition. The authority primarily relied upon in *Lewin* is ***Richards v Mackay*** (1987) [2008] WTLR 1667 in which Millett J (as he then was) stated:

> "[The court] is concerned to ensure that the proposed exercise of the trustee's powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary

> reasonable and prudent trustees might act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate." (page 1671)

4. Reference is also made to ***Tamlin v Edgar*** [2011] EWHC 3949 (Ch), in which Sir Andrew Morritt VC stated at [25]:

> "The very fact that the decision of the trustees is momentous, taking that word from the description of the second category, and that the decision is that of the trustees, not of the court, makes it all the more important that the court is put in possession of all relevant facts so that it may be satisfied that the decision of the trustees is both proper and for the benefit of the appointees and advancees. It is not enough that they were within the class of beneficiary and the relevant disposition within the scope of the power. It must be demonstrated that the exercise of their discretion is untainted by any collateral purpose such as might engage the doctrine misleadingly called a fraud on the power. They must satisfy the court that they considered and properly considered their proposals to be for the benefit of the advancees or appointees. All this requires the full and frank disclosure to the court of all relevant facts and documents. The court is not a rubber stamp and parties and their advisors must be astute not to appear to treat them as such."

5. Essentially, if the proposed transaction is within the Trustee's power, the Court must be satisfied of three matters (following the approach in ***Public Trustee v Cooper***, as referred to in ***Cotton & Moore v Brudenell-Bruce*** [2014] EWCA Civ 1312 at [12]) being:

   i) that the Trustee has in fact formed the opinion that they should act in the particular way relevant to this case;

   ii) that the opinion of the Trustee is one which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived at (this matter having two aspects, namely whether the Trustee has properly taken into account relevant matters and not taken into account irrelevant matters and whether the decision is one which a rational trustee could have come to (***Airways Pension Scheme Trustee Ltd v Fielder*** [2019] EWHC 3027 (Ch) at [5])); and

   iii) that the opinion as not vitiated by any conflict of interest under which the Trustee was labouring.

6. When addressing these matters, the Court must act with caution because "one consequence of authorising the trustees to exercise a power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong." (***Richard v Mackay***) and because "the adversely affected beneficiaries are likely to be at a

relevant disadvantage in such proceedings (assuming even that they have been made parties, which will not always be the case) as compared with the position they might be in if pursuing a hostile action after the event either against the trustees for breach of trust or designed simply to set aside the transaction as flawed", with particular reference to the lack of disclosure or cross-examination (***X v A*** [2006] 1 WLR 741 at [30]).

The circumstances

7. The Trustee is the trustee of five sets of bonds issued in the late 1980s by the Bell Group of companies, which were founded by the late corporate entrepreneur Robert Holmes à Court and headquartered in Perth, Western Australia. Three sets of the Bonds ("the BGNV Bonds") were issued by Bell Group NV ("BGNV") and were guaranteed by the Bell Group holding company, The Bell Group Limited ("TBGL"). Of the remaining two sets of the Bonds ("the Domestic Bonds"), one set was issued by TBGL and another by Bell Group Finance Pty Ltd ("BGF").

8. The BGNV Bonds were issued in three sets being AUD 75m 11% Guaranteed Convertible Subordinated Bonds due 1995 ("the First BGNV Bonds"), AUD 175m 10% Guaranteed Convertible Subordinated Bonds due 1997 ("the Second BGNV Bonds") and GBP 75m 5% Guaranteed Convertible Subordinated Bonds due 1997 ("the Third BGNV Bonds"). The BGNV Bonds are all bearer instruments. For this reason, the Trustee does not know the identities of all the holders of the BGNV Bonds ("the BGNV Bondholders") today.

9. The Domestic Bonds issued by TBGL were AUD 75m 11% Convertible Subordinated Bonds due 1995 and the Domestic Bonds issued by BGF were AUD 75m 10% Guaranteed Convertible Subordinated Bonds due 1996. All of the Domestic Bonds in their entirety have been held, since 1988, by the Insurance Commission of Western Australia ("ICWA"), a state insurance commission.

10. Each of the issues was constituted by a trust deed providing for English law and jurisdiction. There have been supplementary trust deeds for each of the issues but these are not relevant for this claim. For the purposes of this claim, the relevant trust deeds each contain the same material provisions.

11. All the bonds constitute direct, unconditional, unsecured and subordinated obligations of the relevant issuer which rank *pari passu* with all its other subordinated obligations. The method of subordination is that of a "turnover trust" under which, in the event of the insolvency of the relevant issuer or guarantor, receipts (received as though the claims were unsubordinated) are held on trust to be "turned over", after payment of the Trustee's relevant expenses and liabilities, to the relevant liquidator. The claims of the bondholders will then be satisfied only after those of the relevant issuer's or guarantor's ordinary creditors. In the earliest bond trust deed the turnover trust is provided for at clause 6(A)(2) (issuer) and 6(B)(2) (guarantor).

12. Under the trust deeds, the Trustee has an administrative and ministerial role (as described in ***Elektrim SA v Vivendi Holdings 1 Corp*** [2008] EWCA Civ 1178 at [153]). The Trustee has the exclusive right (subject to default) to enforce any rights in respect of the bonds and has an absolute and uncontrolled discretion. The Trustee is only bound to take steps to enforce performance of the trust deed by the issuer or

guarantor if it has been directed to do so by an extraordinary resolution of the bondholders or one fifth of the bondholders in writing and it has been indemnified by the bondholders against the liabilities and costs incurred by such action. In the earliest bond trust deed these matters are provided for at clause 15(G) and 10(B).

13. The bonds defaulted in the early 1990s and, in the course of that decade, the issuing companies all entered into liquidation. TBGL and BGF were wound up in Western Australia in 1991 and 1993 respectively. Since 2014, their sole liquidator has been Mr Anthony Woodings. BGNV entered into liquidation in January 1995 in the Netherlands Antilles and was adjudged bankrupt by the Netherlands Antilles courts in January 1997. Its trustees in bankruptcy, or "Curatoren", are currently Troika Holding B.V., Mr Leo Spigt and Mr Douwe Douwes. BGNV was also wound up in Australia in March 1997 and Mr Gary Trevor is the ancillary liquidator. Mr Trevor is responsible for preserving and recovering any Australian assets of BGNV and remitting them to the Curatoren to be distributed in accordance with the liquidation in Curaçao. The Trustee has sought to prove the debts in respect of the relevant bonds in each of those insolvencies.

14. In 1996, various companies in the Bell Group and their liquidators challenged the validity of security held by various banks over the assets of those companies. The proceedings were issued in the Federal Court but continued in the Supreme Court of Western Australia ("the Bank Proceedings"). Judgment at first instance was delivered in October 2008 and on appeal in August 2012. A further appeal was compromised by a settlement which took effect in 2014 ("the 2014 Settlement"). By the 2014 Settlement, an aggregate sum of approximately AUD 1.7 billion was paid into the liquidation estates of the Australian Bell Group companies and the relevant banks agreed to forego all right to prove in the various Bell Group liquidations. The Trustee's participation in the 2014 Settlement was approved by an order dated 14 April 2014 of Nugee J.

15. The Bank Proceedings were funded, on the part of Bell Group, by various parties, including ICWA and also a company Plaza B.V ("Plaza"). The funding was provided on terms that an application would be made pursuant to the Australian Corporations Law section 564 permitting, ultimately, those funders to be repaid their advances in full and to be paid to a specified extent in priority to the general body of creditors. Plaza provided the funding under a contract called the Bankruptcy Estate Agreement with the Curatoren of BGNV dated January 1997 and subsequently amended in 2009 ("the BEA").

16. Mr Woodings, as liquidator of TBGL and BGF, made the relevant s.564 application in 2014. The application was contested between the various funding creditors of the Bank Proceedings. It was listed, together with other connected proceedings that had been issued in the meantime, in a trial in the Supreme Court of Western Australia to be heard in September 2019 ("the Distribution Proceedings"). The Trustee was joined as a party to the Distribution Proceedings as representative of the BGNV Bondholders save for ICWA but had a limited role. One reason why it sought to take a limited role was that no bondholder had offered to fund or indemnify the Trustee in that respect.

17. One other step which occurred between 2014 and 2019 should be mentioned. Plaza brought proceedings against the Trustee in this court. At that stage the interests of Plaza and of ICWA were firmly opposed and Plaza brought the claim here to seek to

restrain the Trustee from acting contrary to Plaza's interests in alleged breach of trust and in alleged conflict of interest. In her judgment [2015] EWHC 43 (Ch) Proudman J decided that the claim was a breach of an exclusive jurisdiction clause in favour of the courts of Western Australia. An appeal from that decision is presently stayed (see below).

18. In June 2018 the parties to the Distribution Proceedings began mediation, in which the Trustee was only intermittently involved and in a passive role. The principal parties to the Distribution Proceedings, not including the Trustee, reached a concluded settlement in December 2019. That is what I have defined as the 2019 Settlement. The 2019 Settlement is intended to resolve the Distribution Proceedings and various other connected proceedings and is hoped to lead to the completion of the insolvency processes of BGNV, TBGL and BGF.

19. Under the 2019 Settlement, ICWA will receive a substantial payment in the liquidation of TBGL and schemes of arrangement in relation to BGF and others ("the BGF Scheme"). ICWA will receive that sum in its status as a funding creditor of the Bank Proceedings and is not expected to receive any distribution in respect of the Domestic Bonds due to their subordinated status.

20. Under the 2019 Settlement, BGNV will receive a substantial payment, which will flow through BGNV's ancillary liquidation in Australia and BGNV's liquidation in Curaçao, after deductions, to the creditors of BGNV. The Trustee is understood to be the only pre-bankruptcy creditor of BGNV. Under the BEA Plaza is due to recover fixed percentages of the proceeds from BGNV's estate ahead of other unsecured creditors. The sums going to Plaza in this way will represent the substantial majority of those proceeds. Nevertheless once the funds have been used to pay the relevant liquidation costs, there will be a sum available to be paid to the Trustee for distribution to bondholders. The evidence gives an estimate of the sum to be distributed to bondholders. It is substantial in the sense that it represents a payment of more than a few cents on the dollar on the face value of the bonds. Plaza (and ICWA) will receive distributions *pari passu* in their status as BGNV Bondholders.

21. In respect of any claim under the BGNV bonds to TBGL as guarantor, in TBGL's liquidation it is not expected that the Trustee and the BGNV Bondholders would receive any distribution, save for the Trustee's expenses, due to the BGNV Bonds subordinated position in relation to TBGL's other creditors.

22. Also under the 2019 Settlement substantial sums will be paid to: The Commonwealth of Australia, Bell Group (UK) Holdings Ltd, and W.A. Glendinning & Associates Pty Limited. Note that Glendinning is not a creditor of BGNV or TBGL but it is a creditor of BGF.

23. The 2019 Settlement contains a number of conditions precedent to its settlement and payment terms taking effect. First Mr Woodings, Mr Trevor, the Curatoren and Ms Jacqueline Stephenson, the UK liquidator of Bell Group (UK) Holdings Limited are required to obtain approval from the courts supervising the respective liquidations. All four approvals have now been obtained, the most recent being the approval in respect of Ms Stephenson's application given by ICC Judge Jones on 18 June 2020. Second, the BGF scheme as provided for by the 2019 Settlement must come into

effect by 20 August 2020. Given the voting power of the parties to the 2019 Settlement in the BGF Scheme, this condition is expected to be satisfied.

24. Last, the Trustee must obtain the Negative Declaration by 20 July 2020. Mr Woodings is providing the funding for the Trustee to obtain the Negative Declaration. In full, the relevant clause of the 2019 Settlement reads:

> "The LDTC Approval Condition Precedent is satisfied if LDTC obtains final orders or directions from the English High Court or any court exercising appellate jurisdiction from that court which are not subject to any further appeal to the effect that LDTC will be acting properly and is justified in not taking steps to prevent or interfere with the settlement effected by this deed and the BGF Scheme".

25. If the Trustee does not obtain the Negative Direction by 20 July 2020, then the 2019 Settlement will automatically terminate unless the deadline is extended or the requirement is waived. The deadline can be extended by a specified majority of the parties. The condition can be waived by ICWA. In respect of waiver, ICWA has indicated that it should not be assumed that it will do so.

The course of these proceedings

26. The Trustee issued this claim on 24 April 2020. Permission had been obtained from Mann J on 23 April 2020 to issue without naming any defendants. Mann J established a confidentiality regime in which the evidence supporting the claim was marked confidential and not available for inspection. In particular, the contents of the second witness statement of Mr Andrew Legg and its exhibits were treated as highly confidential and were not to be filed but only provided to the court separately, to be returned or destroyed afterwards.

27. Provision was made in the order of 23 April 2020 and in the listing order of 2 June 2020 for any bondholder to request to be joined as a party to the proceedings. Bondholders could also request the provision of the court documents and the non-highly confidential evidence. Such request would only be met if the bondholder provided evidence of its status and a confidentiality undertaking. ICWA has been given notice of these proceedings through its solicitors. The BGNV Bondholders were provided notice of these proceedings on 23 March 2020 and 28 April 2020 in accordance with the relevant trust deeds, by notices in the press (the Financial Times and Luxemburger Wort), and through the European clearing systems Euroclear and Clearstream. Approximately 40% of the First BGNV Bonds, 78% of the Second BGNV Bonds and 82% of the Third BGNV Bonds are held through these clearing systems. The Trustee also give direct notice to those BGNV Bondholders with whom the Trustee had had correspondence in the last 12 months and provided notice through the clearing systems of the 2019 Settlement on 23 December 2019 and these proceedings on 18 May and 1 June 2020.

28. In response a total of 20 BGNV Bondholders (not including Plaza and an associated company Blue Rock Assets Ltd ("Blue Rock") and ICWA) had made contact with the Trustee or had holding verification produced to the Trustee by the date of the hearing. The holdings of those 20 bondholders total 9.7% of the First BGNV Bonds, 9.2% of

the Second BGNV Bonds and 6.7% of the Third BGNV Bonds. In addition to this, Plaza and Blue Rock are known to hold together approximately 8%, 31% and 43% of the three issues respectively. Further, ICWA is known to hold approximately 0.1% of the Second BGNV Bonds.

29. No BGNV Bondholder has requested to be joined as a party to these proceedings. Nevertheless two BGNV Bondholders, Mr Basil Vasiliou and Lonsin Global Credit Fund Ltd ("Lonsin"), have expressed views objecting to the claim. Mr Vasiliou holds approximately 0.17% of the First BGNV Bonds, 5.4% of the Second BGNV Bonds and 4.3% of the Third BGNV Bonds. Lonsin holds 1.94% of the Second BGNV Bonds and 0.36% of the Third BGNV Bonds. None of the other 18 bondholders that have made contact with the Trustee in respect of these proceedings have expressed a view on the claim. Plaza and Blue Rock have indicated their support for the claim.

30. For the purposes of this claim, the trustee provided the court with 10 witness statements or affidavits. Mr Legg, a partner of the Trustee's solicitors, having represented the Trustee in relation to these matters for approximately 18 years, sets out the factual material in his first witness statement. He also exhibits the witness statements and affidavits of Mr Spigt, Mr Trevor and Mr Woodings which contain those individual's views on the 2019 Settlement from their perspectives. Ms Anderson is the director of the Trustee with primary responsibility in respect of the Bonds. She describes the Trustee's decision to bring this claim and its reasons for doing so. Mr Legg's second witness statement and exhibits contain and comment upon the highly confidential material, which consists of two more affidavits from Mr Woodings. These two further affidavits of Mr Woodings set out his views on the 2019 Settlement supported by detailed calculations. Mr Legg's third witness statement and Ms Anderson's second were provided on 23 June 2020 in order to update matters and confirm the Trustee's position.

31. Mr Vasiliou and Lonsin were provided with all the material save for the highly confidential material. They jointly instructed Humphries Kerstetter LLP and its senior partner, Mr Mark Humphries, provided a witness statement setting out Mr Vasiliou's and Lonsin's objections. Mr Vasiliou, Mr Jonathan Croft of Lonsin and Mr Humphries were all invited to the hearing and all attended the hearing at least in part, save as set out below in relation to the highly confidential material.

Privacy Application

32. The first issue dealt with at the hearing was the Trustee's application that the hearing should be in private. Mr Vasiliou and Lonsin objected to the hearing being in private and the Court was shown a letter from Humphries Kerstetter dated 24 June 2020 which set out that objection.

33. In respect of Mr Vasiliou and Lonsin, the Trustee did not object to them and their representative, Mr Humphries, attending a private hearing on the condition that an order was made against them which preserved the confidentiality of the hearing and they were not permitted to attend any part of the hearing in which the highly confidential material was discussed.

34. I decided that the substantive application should be held in private on that basis, with my reasons to follow in this judgment.

35. Hearings should be in public unless they must be held in private (CPR r39.2). A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) of r39.2. Two sub-paragraphs relevant in this case are:

> (a) publicity would defeat the object of the hearing,
>
> and
>
> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.

36. I start with the so called highly confidential material. This consists essentially of the two affidavits of Mr Woodings, put into evidence in this case by the second witness statement of Mr Legg. The first of those affidavits contained Mr Woodings' privileged reasoning lying behind his agreement to the 2019 Settlement and was placed before the Supreme Court of Western Australia by Mr Woodings on the occasion of his own application as liquidator for the approval of the 2019 Settlement. The second is an updating affidavit provided for the purposes of this claim but it addresses the same material. The Supreme Court of Western Australia considered it appropriate to proceed in a manner which preserved the confidentiality of the material (***Re Bell Group Ltd (in liq)*** [2020] WASC 121 per Hill J at [5]). The Trustee is permitted by Mr Woodings to use this material only on the basis that it is treated as highly confidential. It is clear that the court should sit in private to deal with this material but to handle that material alone, it would be possible to sit privately only for part of the hearing. The fact that the highly confidential information may require the hearing to be conducted in private for a part of it does not justify hearing the whole application in private. That question depends on the position of other evidence, which is designated as confidential but not highly confidential.

37. There is always a possibility in some cases that the matter could be conducted as a public hearing but that certain specific confidential information would just not be spoken or read out loud. However that would not be a practical way to conduct this hearing. In other words, if the confidentiality of the other evidence is to be preserved, then the hearing would have to be in private.

38. The fact that information is said to be confidential does not mean that ground (c) operates to trump a public hearing in every case in which that sort of material will have to be referred to. Far from it. Court hearings will frequently involve a public airing of matters which one or both parties would prefer to keep confidential. The fact that information was indeed confidential prior to the hearing, on its own, is not a sufficient justification for sitting in private. To decide the issue it is necessary to examine critically the reason for the confidentiality and why that confidentiality has to be preserved at the expense of justice being done in public.

39. Another factor to keep in mind is the difference between a hearing in private and a confidential judgment. In this case it is likely to be possible to deliver a public judgment without the necessity of referring to the details whose confidentiality justifies a private hearing.

40. What I have called the "other" evidence, which is confidential but not highly confidential, includes the detailed terms of 2019 Settlement and the witness statements of Mr Spigt and Mr Trevor, as well as the first affidavit of Mr Woodings. The detailed terms of 2019 Settlement and the witness statements of Mr Spigt and Mr Trevor were provided to the Trustee on the basis that they be kept confidential. I accept that there is a real risk that if that information was released, it may prompt a failure of the 2019 Settlement to complete, which in turn would defeat the purpose of this claim (CPR r39.2 ground (a)). That is a sufficient reason on its own to conduct the hearing in private.

41. Further justifications for the matter to be held in private under CPR r39.2 ground (c) are (i) that the witness statements of Mr Spigt and Mr Trevor contain privileged material, and (ii) that the material also contains information that is confidential to the trusts which may be price sensitive in that it relates to traded securities.

42. The order I have made provides that the hearing be held in private and that Mr Vasiliou and Lonsin be permitted to attend the hearing insofar as it relates to their objections to the claim, but also they be required to preserve the confidentiality of the hearing and material. This meant that Mr Vasiliou, Mr Croft and Mr Humphries could attend the hearing save to the extent that the highly confidential information was discussed. As it turned out, this meant that Mr Vasiliou, Mr Croft and Mr Humphries were excluded from a discussion of approximately 15 minutes only.

The position of the Trustee

43. The Trustee's position in respect of the Domestic Bonds is fairly straightforward. ICWA, as the exclusive holder of the Domestic Bonds, has itself agreed to the 2019 Settlement, including a requirement for the Negative Declaration, its ability to waive the same and its obligation to not actively oppose this claim. ICWA has also expressly indicated to the Trustee that it does not require the Trustee to take any steps in relation to the 2019 Settlement to protect its interests. ICWA has been informed of these proceedings, including this hearing, and has chosen not to attend or participate. While ICWA will not receive any distribution by virtue of the Domestic Bonds themselves, it will receive a direct payment under the 2019 Settlement. Accordingly, the Trustee is of the opinion that it is justified in not interfering with the 2019 Settlement on behalf of ICWA. I am satisfied that that is a reasonable opinion to have reached.

44. The position of the BGNV Bonds and their bondholders is the central issue in these proceedings. Ms Anderson, on behalf of the Trustee, stated that the Trustee believed the 2019 Settlement to be in the best interests of the BGNV Bondholders. The reasons why are explained below.

45. The Trustee has relied upon the view expressed and explained by Mr Woodings, in his highly confidential affidavits, that the 2019 Settlement represents a better outcome for TBGL and BGF than the continuation of the Distribution Proceedings and other proceedings resolved by the 2019 Settlement would represent. It will be recalled that Mr Woodings is the liquidator of TBGL and BGF. As part of that view, Mr Woodings also calculated that the 2019 Settlement was in the interests of the creditors of the Australian Bell group companies, i.e. including BGNV. The Trustee has had dealings with Mr Woodings over a number of years and respects his competence and

judgment as an experienced insolvency professional. Mr Woodings' evidence was accepted by the Supreme Court of Western Australia when he made his application for approval of the 2019 Settlement as liquidator of TGBL and BGF (***Re Bell Group Ltd (in liq)*** [2020] WASC 121 at [79] in particular).

46. The Trustee has also relied upon the views expressed and explained by Mr Spigt and Mr Trevor, in their witness statements, that entering into the 2019 Settlement is in the best interests of BGNV. It will be recalled that Mr Spigt and Mr Trevor are respectively one of the Curatoren and the Australian liquidator of BGNV itself.

47. An important point is the relationship between the interests of BGNV and the interests of the BGNV Bondholders. The Trustee believes that the interests of BGNV and the BGNV Bondholders overlap in this regard because, as BGNV's only pre-bankruptcy creditor, the more BGNV recovers, the more will be distributed to the BGNV Bondholders. I agree with that analysis. It follows that a view of what the best result reasonably achievable for BGNV would be, will prima facie represent the means to achieve the best result reasonably achievable for the BGNV Bondholders.

48. The alternative case to consider would be if the Trustee took steps to try to stymie the 2019 Settlement. If the settlement does not complete then the likely result would be continuation of the Distribution Proceedings and other litigation. The views of Messrs Woodings, Spigt and Trevor, taken together, are that such proceedings are unlikely to be concluded in less than 7 years but are likely to be concluded within about 10 years, with 15 years as a back stop. From the evidence before the court and bearing in mind what has happened since the early 1990s, it seems to me that 10 years is a reasonable estimate of the timescale, bearing in mind it could be longer than that. That is the timeframe within which the BGNV Bondholders would recover if the 2019 Settlement were to fail. There is no evidence of there being any realistic prospect of another settlement if this one fails.

49. Another relevant factor is the likely extra litigation costs to be incurred if proceedings continue. The evidence of Mr Trevor is that the liquidators of BGNV have been incurring costs in the Distribution Proceedings which are significant having regard to the overall sums in issue. These costs are currently being met by Plaza but which Plaza will expect to recover from BGNV before the other BGNV bondholders. In my judgment the Trustee is entitled to place weight on that.

50. The Trustee also points out that it would be unable to actively participate in any further proceedings without funding and the relevant direction from the BGNV Bondholders. No bondholders have given an indication that they would be willing to provide either. On the evidence I have it is clear that bondholders have had every opportunity to provide funding if they wished to do so.

51. Pulling this together, it is not necessary to set out the figures in any detail because the overall point can be made qualitatively without them. The evidence is that if the proceedings were not settled and therefore were to continue, then the likely recovery for BGNV ranges between a figure lower than the sum to be paid to BGNV under the 2019 Settlement, to a figure higher than it. The range is larger than the settlement sum itself, showing that the uncertainty is very wide. Furthermore one has to bear in mind two matters. First is the time value of money. The only safe working assumption is that any payout would be about 10 years from now. The magnitude of

the upper end of the range of possible payouts is not so far from the settlement sum to ignore that effect. Time will erode the difference. In any event there is no basis for assuming that a payout at the upper end is any more likely than a payout well below the settlement sum at the bottom of the range. The second matter to take account of is litigation cost. Given the costs so far in these claims, it is safe to assume that continued litigation would run up costs of a similar scale. These costs are also significant by comparison with the sums under consideration. Foregoing the risk of them being taken out of the funds available to be paid out is therefore a considerable benefit.

52. Overall, at this stage it seems to me that while there are inevitable and significant uncertainties, nevertheless there is a convincing case that the trustee acting reasonably in these circumstances would not oppose the settlement. However before I conclude there are further points to consider.

Objections by bondholders

53. The objections raised by Mr Vasiliou and Lonsin are set out in Mr Humphries' witness statement. The major point is a contention that three parties: ICWA, Plaza and Glendinning, are receiving an excessive amount under the 2019 Settlement to the detriment of the BGNV Bondholders. As mentioned already, although these bondholders had the opportunity to join this claim and put their case directly to the court, they have not done so. Nevertheless it is obviously right that the Trustee should consider their views and put them before the court, as it has done.

54. The reason the objectors did not join the claim was due to concerns in respect of an adverse costs orders. That is a legitimate position to take but it also chimes with the general point that no bondholder, including Mr Vasiliou and Lonsin, has offered to provide any indemnity to the Trustee in relation to this issue.

55. In respect of ICWA and Glendinning, the Trustee's response is to draw attention to the mechanism whereby the funds those parties would receive under the 2019 Settlement. ICWA would receive a direct amount in respect of the liquidation of TBGL and the BGF Scheme. Glendinning is a creditor, albeit by a purchase of the claim, of BGF. Neither ICWA nor Glendinning are receiving any prioritised sum directly from BGNV. Therefore ICWA's and Glendinning's prioritised recoveries are relevant only insofar as they reduced BGNV's share under the 2019 Settlement.

56. The question then becomes whether there is a realistic opportunity of increasing BGNV's share under the 2019 Settlement. Based on the evidence of Mr Woodings, Mr Spigt and Mr Trevor, the Trustee believes there is not. I agree that that is what the evidence demonstrates. Moreover in my judgment the Trustee is right and entitled to take that evidence into account in that way.

57. The position of Plaza is different. Whereas ICWA and Glendining receive funds directly under the 2019 Settlement, Plaza does not. The agreement provides that the funds will be paid to BGNV. Plaza stands to receive the lion's share of that money but it does so not under the terms of the 2019 Settlement Agreement but rather due to its relationship with BGNV. As the evidence puts it Plaza and BGNV have a close relationship. The majority of Plaza's recovery of funds is prioritised ahead of the BGNV bonds by reason of the BEA, which I will come to next. At this stage however

the relevant point is that Plaza's and the BGNV Bondholders' interests are aligned as far as recovery for BGNV itself is concerned. A higher return to BGNV results in higher returns for Plaza and for BGNV Bondholders.

58. One of the objections of the objectors is about the operation of the BEA. However the Trustee's view on this is as follows. The claims of Plaza in BGNV's liquidation are a matter separate from the 2019 Settlement. They are a matter instead of its status as a post-bankruptcy creditor and under the BEA as a matter of Curaçao law. However the Trustee also makes the point that there is not a realistic likelihood of a challenge to Plaza's distribution in any event. For one thing it was only as a result of the funding of the Bank proceedings to which Plaza contributed in the first place that there are any assets to distribute. Moreover the original BEA was dated 1997 and was amended in 2009 and the Curaçao courts have approved the BEA in both its original and amended form. Delay is a major factor. BGNV bondholders were notified of the BEA by the Trustee a number of years ago. In 2016/2017, which is relatively recently in the context of the affairs of the Bell Group overall, Lonsin was in correspondence with the Trustee raising concerns about the BEA. Nevertheless nothing happened not least because the Trustee was not funded to take any steps. Furthermore, while the 2019 Settlement does provide for the settlement of disputes in relation to the BEA to a certain extent, the Trustee makes the point that it is not a party to the 2019 Settlement and therefore it is not bound by the same. In theory at least it could still pursue a challenge to the BEA or Plaza's distribution in due course – assuming it was correctly instructed and funded to do so (which at the risk of repetition, has not happened so far). In my judgment, again based on the evidence, the Trustee's stance on the BEA explained in this paragraph is a reasonable one.

59. Mr Humphries also set out a concern that the priority payments to ICWA, Plaza and Glendinning are contrary to the terms of the trust deeds. The Trustee does not agree, making the point that the BGNV Bonds are all expressly subordinated bonds and that the terms of the trust deeds should not affect Plaza's status, in particular, as a post-bankruptcy creditor. That is a reasonable view for the Trustee to take.

60. The objectors submit that what should happen is that there should be a meeting of bondholders to decide whether to approve the 2019 Settlement. The Trustee's response is simply that the timing makes a meeting unrealistic and impractical, given that the terms of the 2019 Settlement require the Trustee to obtain court approval for its stance by 20th July. No doubt a very small extension of that timetable may be negotiable – although there is no guarantee of that – but much more time than that would be required to give proper notice and convene a meeting of bondholders. I agree.

61. While the hearing was underway Mr Croft of Lonsin sent an email to Ms Anderson expressing some further concerns. It was placed before the Court. First Mr Croft asked for clarification on the Trustee's funding for these proceedings. That was provided. There is a provision in the 2019 Settlement agreement which indemnifies the Trustee for its costs of this application. Second Mr Croft queried whether the Trustee's recovery of its expenses as a priority gives rise to a conflict of interest with the BGNV Bondholders. The answer is that it does not. The trust deeds provide for that priority. In any case in this respect the Trustee's and the BGNV Bondholders' positions are essentially aligned in relating to maximising BGNV's recovery. Third Mr Croft repeated the point about a meeting of the BGNV Bondholders and

contended that given their status under the agreement Plaza and ICWA may not be entitled to force the objecting bondholders to accept the 2019 Settlement. Although not mentioned by name, this submission relates to the abuse of voting power principle referred to in ***Assenagon Asset Management SA v Irish Bank Resolution Corporation Ltd*** [2012] EWHC 2090 (Ch) (and see also ***Redwood Masterfund Ltd v TD Bank Europe Ltd*** [2006] 1 BCLC 149). The simple answer to this is that since a meeting is not a realistic prospect, there is therefore no need to examine the ***Assenagon*** point. Finally, Mr Croft expressed the view that the distribution to Plaza is not separate from the 2019 Settlement because Plaza's distribution would have informed the negotiations. No doubt from a commercial point of view that is so. However it does not alter the fact that the 2019 Settlement provides for a payment out to BGNV rather than Plaza.

62. Having examined the points taken by the objectors, I find that none of them individually or together, amount to a sufficiently cogent reason to refuse the declaration sought by the Trustee.

Further matters – full disclosure

63. The Trustee also raised four additional points, in order to put the position to the court as fully as possible.

64. First, the Trustee makes the point that it does not have the full picture in respect of the 2019 Settlement. It is not a party to that settlement and it has not received all the documents and information or any direction or funding to carry out relevant investigations. Instead it has had to rely upon the investigations and opinions of those parties who do have more information, being Mr Woodings, Mr Spigt and Mr Trevor. Furthermore even assuming the settlement comes into force, there are a number of uncertainties in the steps between the payments under it and the Trustee receiving the relevant distributions over which it has no control. One reason is due to the Trustee's lack of direct participation in the 2019 Settlement. The Trustee has based its opinion on expectations and a range of possible recoveries rather than fixed figures, as I have explained above. The Trustee's position is that these uncertainties, while real, do not undermine the reasonableness of its view that it is justified in not interfering with the 2019 Settlement. I accept that.

65. Second, there was uncertainty in respect of the tax position in the UK. This has been resolved in respect of the BGNV Bonds. It remains formally unresolved in respect of the Domestic Bonds but it is reasonable to expect the result with be the same.

66. Third, there is an argument, arising from the first instance decision in the Bank Proceedings, that the turnover provisions give rise to a presently constituted trust in favour of unsubordinated creditors. Therefore, the argument goes, the Trustee owes duties under the Domestic Bonds to both ICWA (as bondholder) and to the unsubordinated creditors of TBGL and BGF (which included BGNV), and is in a position of conflict as between these duties. This argument was one of the matters advanced by Plaza in the proceedings in this court before Proudman J. The Trustee contends that any obligations it has to the unsubordinated creditors under the turnover provisions must at all stages be limited to their expectation that the Trustee will perform those provisions, in other words specifically that it will upon receipt of a dividend turn that dividend over, less its retention, either to them or to the liquidator

for distribution to them. On this basis it does not seem to the Trustee that the interests of the unsubordinated creditors of the Issuers are engaged by the proposed Negative Direction. The important point as it seems to me is that even if there is such a presently constituted trust (as to which I express no view), the 2019 Settlement does not affect any right that such creditors would have against the Trustee and therefore no conflict in fact arises. I would add that no such concern arises in respect of the creditors of BGNV as there are no other creditors.

67. Fourth, whatever may have been the position before about a conflict between the interests of ICWA, as the Domestic bondholder, and the interests of the BGNV Bondholders, including Plaza, the Trustee contends that the 2019 Settlement resolves any such conflict. The Trustee's view is that the 2019 Settlement is in the best interests of all the bondholders as a class. I agree. In any event ICWA does not require the Trustee to protect its interests and is relying on its status as a funder of the Bank Proceedings rather than the Domestic bondholder. That reinforces the point that in this context the Trustee is not being put in a position of conflict of interest.

Conclusion on the Negative Declaration

68. In my judgment the position the Trustee finds itself is as follows. There is no opportunity or realistic prospect of re-negotiating the 2019 Settlement. The choice is a binary one and it arises now. That is the only sensible way of looking at the current circumstances. A meeting of bondholders is unrealistic. The 2019 Settlement will bring an end to a great deal of protracted litigation. That is so even if some litigation about the BEA emerges, which seems unlikely. The right approach for the trustee is to consider the interests of the BGNV Bondholders. There is no present conflict of interest which affects this decision. The Domestic Bonds and the position of other creditors of TBGL or BGF do not play a significant part in the analysis.

69. Under the settlement the interests of BGNV and of the BGNV Bondholders are aligned. The evidence is that the settlement is in the clear interests of BGNV. That evidence is from reputable professionals on whom it is reasonable for the Trustee to place weight, particularly Mr Woodings with whom the Trustee has had dealings for some years. Moreover it is inherently probable that settlement now involving a substantial payout to BGNV is an appropriate course to take when the alternative is many years more of expensive and uncertain litigation.

70. There are objections from bondholders, who hold a small but much more than trivial percentage of the bonds. They represent an appreciable share of the bondholders who contacted the trustee following notification of these proceedings. Nevertheless there are other bondholders who have contacted the trustee and do not oppose. Moreover the likelihood is that many more bondholders are well aware of this proposal and have not seen fit to contact the trustee. They certainly do not oppose the claim.

71. Under the trust deeds the Trustee has an administrative and ministerial role. The Trustee has in fact formed the view that it should not take steps to prevent or interfere with the 2019 Settlement. I am satisfied that that opinion is one a reasonable trustee properly instructed could properly arrive it. It is not vitiated by any conflict of interest. The declaration sought should be made.

Ancillary Declarations

72. The Trustee is seeking a number of directions in addition to the Negative Direction.

73. First, BGNV have asked the Trustee to confirm that it will consent to orders to effect the discontinuance of the Distribution Proceedings in Western Australia and to the UK appeal from the proceedings brought by Plaza which came before Proudman J. In the former proceedings, the Trustee is a party, albeit with a limited role. Both sets of proceedings are resolved by the 2019 Settlement. I agree with the Trustee that there is no reason to not consent to the discontinuance of both sets of proceedings with no order as to costs if the Negative Declaration has been granted.

74. I am satisfied that it is appropriate to make this additional direction. The discontinuance of such proceedings is a consequence of the 2019 Settlement and it cannot be in the interests of the Trustee or any of the holders of the bonds for such proceedings to continue should the 2019 Settlement proceed.

75. Second, the parties to the 2019 Settlement consider it desirable that a shortcut in respect of the payment steps be approved relating to TBGL. This is referred to as the "payment shortcut" direction. Under the turnover trust, the full payment process would be for Mr Woodings to pay the Trustee the dividend in the winding up of TBGL *pari passu* with all other creditors. The Trustee would then deduct an amount that the Trustee is entitled to retain in respect of its expenses, and then repay the remainder to Mr Woodings to be distributed to unsubordinated creditors. The proposal instead is that Mr Woodings and the Trustee agree an amount that the Trustee would be entitled to deduct and that the Trustee is paid only that amount. It will be recalled that there will be no dividend payable to bondholders from the liquidator of TBGL.

76. The full terms of the declaration sought are:

> "3. Provided that the Trustee and the liquidator of The Bell Group Limited first agree the amount to be paid towards the LDTC Retention (as defined in paragraph 4 below), albeit without prejudice to the rights of any interested party to contend after its payment that the amount was too high (or too low), the trusts the subject of clause 6(B) of the First BGNV Trust Deed and clauses 5(B) of the Second BGNV Trust Deed, the Third BGNV Trust Deed, the TBGL Trust Deed and the BGF Trust Deed can each properly be performed by:
>
> (a) LDTC accepting from the liquidator of TBGL an amount towards the LDTC Retention (as defined below);
>
> (b) rather than by LDTC requiring TBGL paying to LDTC a dividend in its winding up on LDTC's proofs of debt *pari passu* with all other creditors, LDTC then deducting from that dividend an amount to satisfy the LDTC Retention and then paying the balance to the liquidator of TBGL on terms that the liquidator distribute the balance to those persons with Relevant Claims (as defined in the Trust Deeds).

> 4. For the purposes of paragraph 3 above, the "LDTC Retention" means such sums as LDTC is entitled to retain under clauses 6(B)(2)(i) of the First BGNV Trust Deed and clauses 5(B)(2)(i) of the Second BGNV Trust Deed, the Third BGNV Trust Deed, the TBGL Trust Deed and the BGF Trust Deed."

77. The proposal contains an important safeguard in paragraph 3, whereby the agreement between the Trustee and the liquidator does not preclude another interested party later contending it is in the wrong amount, albeit only after the sum has been paid.

78. It is appropriate to make the payment short cut order. It is an obviously sensible provision and I am satisfied that it is within the Trustee's power to short cut that payment process in these circumstances. The safeguard for interested parties is appropriate. I will make the declaration.

79. Third, the Trustee seeks orders that continue the confidentiality regime established by Mann J. I am satisfied that such orders are appropriate.

80. Finally, the Trustee seeks that its costs are in the trusts' estate. I will make that order.

Note

81. In the usual way a confidential draft of the judgment was provided to the party (the Trustee) in advance of public handing down, to allow for typos and other corrections to be identified. In addition I indicated to the Trustee that I thought that judgment in the form of the draft could be given in public but invited the Trustee, before the handing down, to identify the relevant passages which it contended ought not to be. The Trustee identified one or two matters and made constructive suggestions for how to deal with them. I have grateful for those observations and have taken them on board. The result is that I am satisfied that judgment in this form can be given in public.